Filed 12/4/12 Papudesi v. Northrup Grumman Corp. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KRISHNA PAPUDESI, Plaintiff and Respondent, v. NORTHROP GRUMMAN CORP., Defendant and Appellant.	B235730 (Los Angeles County Super. Ct. No. BC452975) ORDER MODIFYING OPINION [no change in the judgment]

THE COURT:

It is ordered that the opinion filed herein on November 29, 2012, be modified as follows:

1. On page 4, insert the following footnote (footnote 1) at the end of the second paragraph,: "Northrop's request for judicial notice of the arbitration proceedings is granted."

2. On page 11, first paragraph, the last sentence, which reads as follows: "For reasons we set forth in another case, *Franco v. Arakelian Enterprises, Inc*. (case No. B232583), we disagree." is deleted and replaced with the following: "For reasons we set forth in a case we decided earlier this week, *Franco v. Arakelian Enterprises, Inc*. (Nov. 26, 2012, B232583), ___ Cal.App.4th ___ [2012 WL 5898063; 2012 Cal.App. Lexis 1207]), we disagree.

3. On page 12, first line, the reference: "*Franco v. Arakelian Enterprises, supra,* (B232583)" is changed to: "*Franco v. Arakelian Enterprises, supra,* ___ Cal.App.4th ___ [2012 WL 5898063; 2012 Cal.App. Lexis 1207]."

These modifications effect no change in the judgment.

NOT TO BE PUBLISHED.

MALLANO, P. J. CHANEY, J. JOHNSON, J.

Filed 11/29/12 Papudesi v. Northrop Grumman CA2/1 (unmodified version)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KRISHNA PAPUDESI, Plaintiff and Respondent, v. NORTHROP GRUMMAN CORP., Defendant and Appellant.	B235730 (Los Angeles County Super. Ct. No. BC452975)

APPEAL from an order of the Superior Court of Los Angeles County. Richard L. Fruin, Jr., Judge. Reversed with directions.

Gibson, Dunn & Crutcher, Scott A. Kruse, Eugene Scalia, Jesse A. Cripps and Lynn Hang for Defendant and Appellant.

Cohelan Khoury & Singer, Michael D. Singer, J. Jason Hill; Aegis Law Firm and Kashif Haque for Plaintiff and Respondent.

An employee signed an integrated employment contract with her employer that had no provision regarding dispute resolution. Years later, the employer instituted a mandatory policy calling for employees to submit any employment dispute to arbitration. When the employee filed a class action wage and hour lawsuit against the employer, the employer petitioned the trial court to stay civil proceedings and compel arbitration. The trial court denied the motion, finding the policy mandating arbitration was not a valid modification of the original employment contract. We conclude the arbitration policy did not modify the original employment contract but constituted a separate agreement. The issue is whether the agreement is enforceable. Because the trial court did not reach this issue, we remand the matter for further proceedings.

BACKGROUND

Plaintiff Krishna Papudesi began her employment with defendant Northrop Grumman Corporation in September 2003 as a systems analyst. As a condition of employment she signed an agreement providing her employment was at-will and for no definite period of time, Northrop reserving the right to terminate the employment at any time without cause. The one-page agreement provided that Papudesi would "comply with the rules and policies of Northrop" and "all written and verbal safety rules and operating guidelines," and would work any job or shift necessitated by operations. The final clause of the contract stated, "This Employment Agreement constitutes the entire agreement between me and the Company *with respect to the subject matters covered in this Agreement*, and supersedes all prior agreements and understandings relating to such matters, whether written or oral. This Agreement may not be superseded, amended, or modified except by written agreement signed by me and by an officer of the Company." (Italics added.) The agreement was silent on Northrop's dispute resolution policy.

Three years later, in September 2006, Northrop distributed to employees by First Class and electronic mail materials setting forth its new dispute resolution

policy. In them, policy No. H103, a 14-page document entitled "Dispute Resolution Process," set forth Northrop's dispute resolution procedure, the last step of which was binding arbitration. Policy No. H103A, comprising 11 pages and entitled "Employee Mediation/Binding Arbitration Program," set forth Northrop's arbitration policy.

Under the arbitration program, the non-initiating party would choose between two arbitration tribunals, JAMS and AAA. The arbitration would be conducted first pursuant to any legally required procedural rules, then rules specifically set forth in the policy itself, then the chosen tribunal's rules, copies of which could be obtained online or through Northrop's human resources managers. The arbitrator was vested with "authority to decide any disputes regarding discovery," and any party that sought more than three depositions would be required to hold a joint meeting with the arbitrator to discuss discovery issues, limitations and scheduling. The arbitration policy provided that "[i]f . . . any party prevails on a claim, which (if brought in a court) affords the prevailing party attorneys' fees and/or costs, then the arbitrator may award reasonable fees and/or costs to the prevailing party to the same extent as would apply in court."

The arbitration program also contained the following class waiver: "To the extent it is permissible to do so in the jurisdiction where the arbitration is held and (if applicable) the jurisdiction where the parties' obligation to arbitrate claims under this Program is enforced, both you and the Company waive the right to bring any covered claim under this Program as a class action. In jurisdictions where this is permissible, the arbitrator will not have authority or jurisdiction to consolidate claims of different employees into one proceeding, nor shall the arbitrator have authority or jurisdiction to hear the arbitration as a class action."

Policy Nos. H103 and H103A both included the following language: "By accepting or continuing employment on or after 1 November 2006, all covered employees agree to submit any covered disputes to binding arbitration, rather than to have such disputes heard by a court or jury."

Papudesi continued to work for Northrop until her employment was terminated in April of 2008.

In February 2010, Papudesi's counsel sent a demand letter to Northrop alleging wrongful termination in violation of public policy and intentional infliction of emotional distress. Northrop demanded arbitration and Papudesi complied, submitting a request for mediation and a demand for arbitration to her former employer.

Eleven months later, while arbitration proceedings were ongoing, Papudesi filed the instant class action lawsuit, alleging Northrop failed to pay overtime wages, provide meal and rest periods, pay wages in a timely manner, or provide itemized wage statements.

Northrop moved to compel arbitration and stay all civil court proceedings, arguing policies No. H103 and No. H103A constituted a valid agreement to submit any employment disputes to binding arbitration. It argued Papudesi waived any claim that the agreement was unenforceable by previously submitting her tort claims to arbitration in February 2010. Noting that in meet-and-confer efforts Papudesi had argued Northrop arbitration policy was invalid under *Gentry v. Superior Court* (2007) 42 Cal.4th 433 (*Gentry*) because it contained a class waiver, Northrop argued *Gentry* had been superseded by *AT&T Mobility, LLC v. Concepcion* (2011) 131 S.Ct. 1740 (*Concepcion*).

In opposition to the motion, Papudesi argued the arbitration policy was unenforceable for four reasons: It constituted a modification of the employment that was invalid because it was not signed, as required by the integration clause of the original employment contract; it was unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83 (*Armendariz*); it was invalid under *Gentry* because it contained a class waiver; and it was invalid because section 7 of the National Labor Relations Act, title 29 United States Code section 151 et seq., prohibits class action waivers in the employment context.

At some point, Papudesi also filed motions for discovery that would inform a *Gentry* analysis.

Before the hearing the trial court issued a tentative ruling that it later adopted as its final ruling. In it, the court found policies No. H103 and No. H103A were invalid because they constituted an attempt to modify Papudesi's original employment contract, but had not been signed by either Papudesi or an officer of Northrop, as required by the agreement. The court also found that by submitting her discrimination and tort claims to arbitration Papudesi did not waive the right to file a civil wage and hour lawsuit because absent an arbitration agreement, an employee is free to pursue severable claims in different forums. The court denied Northrop's motion, declined to reach the unconscionability or class waiver issues, and deemed plaintiff's motions for discovery to be moot.

Northrop appeals.

DISCUSSION

A. Policies H103 and H103A Set Forth a Separate Agreement

Northrop contends the trial court erred in finding the arbitration agreement set forth in policy Nos. H103 and H103A was an invalid attempt to modify Papudesi's original employment agreement. We agree.

"The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract." (*Engineers & Architects Assn. v. Community Development Dept*. (1994) 30 Cal.App.4th 644, 653.) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972.) Courts will uphold

the trial court's resolution of disputed facts if they are supported by substantial evidence. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277.) Where no disputed evidence is considered by the trial court, "we will review its arbitrability decision de novo." (*Ibid.*)

Here, Papudesi's employment agreement constituted the parties' entire agreement "with respect to the subject matters covered" by it, and could not be modified except by a written agreement signed by the parties. The "matters covered" by the agreement included the at-will nature of Papudesi's employment and her duty to comply with Northrop's safety rules and policies and work any shift or job necessitated by operations. Although Papudesi's compliance with Northrop's "policies" was a "matter[] covered" by the contract, nothing prohibited Northrop from introducing new policies without a signed writing.

On the contrary, because at-will employment permits an employer to discharge or demote an employee without cause, it necessarily also "authorizes an employer unilaterally to alter the terms of employment, provided the alteration does not violate a statute or breach an . . . agreement." (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 620, citing *Scott v. Pacific Gas & Electric C*o. (1995) 11 Cal.4th 454, 465; see Labor Code, § 2922 ["[a]n employment having no specific term may be terminated at the will of either party"].) Papudesi was an at-will employee. Northrop was therefore entitled to alter the terms of her employment by instituting new policies as it saw fit.

Papudesi maintains that she never received the arbitration policy and never agreed to it. The record is to the contrary. First, Northrop's human resources director declared the policy was sent to Papudesi twice—once via mail and again via electronic mail. This created a presumption that she received the materials. (*Craig v. Brown & Root, Inc*. (2000) 84 Cal.App.4th 416, 421.) Papudesi has offered no evidence rebutting this presumption. Further, policy Nos. H103 and H103A both provided that the employee's acceptance of continued employment constituted acceptance of the arbitration agreement. (*Schachter v. Citigroup, Inc*.,

supra, 47 Cal.4th at p. 620 [an employer may condition continued employment upon the acceptance of a newly incepted policy].) Papudesi continued her employment with Northrop, thereby accepting the arbitration agreement.

B. The Arbitration Policy is not Unconscionable

Papudesi contends that even if policy Nos. H103 and H103A constitute a separate, independent agreement, the agreement is unconscionable. Although the trial court declined to reach this issue, the state of the record permits us to review Papudesi's claim.

"A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) Courts may refuse to enforce a contract or clause on the ground that it was unconscionable when formed. (Civ. Code, § 1670.5, subd. (a).) Papudesi argues the arbitration agreement was unconscionable because it failed to provide clear rules and limited discovery and remedies.

Unconscionability has both a procedural and a substantive element. (*Gentry*, *supra*, 42 Cal.4th at pp. 468-469.) The procedural element focuses on oppression or surprise that arises from unequal bargaining power. This usually takes the form of a contract of adhesion which, drafted by the party with superior bargaining strength, allows the other party the option only to adhere to the terms or reject them. The substantive element looks to the results, and whether they are overly harsh or one-sided. (*Ibid*.) Although both elements must be present, they need not be present in an equal degree. A sliding scale is used: the more procedurally unconscionable a contract may be, the less substantive unconscionability is necessary and vice versa. (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) As the party opposing the arbitration, Papudesi bears the burden of proving unconscionability. (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.)

1. Procedural Unconscionability

In a section heading in her respondent's brief Papudesi argues, without elaboration, that the arbitration agreement set forth in policy Nos. H103 and H103A was procedurally unconscionable "because of the manner in which it was presented." We assume she means to suggest policy Nos. H103 and H103A possessed a degree of procedural unconscionability because they were presented on a take-it-or-leave-it basis by a party with superior bargaining power. We agree.

"Procedural unconscionability pertains to the making of the agreement; it focuses on the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795.) Nonnegotiable contracts are procedurally unconscionable in the employment context. (*Armendariz*, *supra*, 24 Cal.4th at p. 115; *Ajamian v. CantorCO2e, L.P.*, *supra*, at p. 796.)

Here, Northrop had superior bargaining power and presented the policy on a take-it-or-leave-it basis. Nothing in the record suggests any part of the arbitration policy was negotiable. On the contrary, Northrop informed its employees that continued employment constituted acceptance of the agreement as is. The policy was therefore procedurally unconscionable to a degree.

But Papudesi could not have been surprised by the terms of the arbitration policy. Surprise has been found in situations where policy descriptions are inaccurate or hidden in small font or buried in prolixity. (*A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.) Here, the policy was set forth in an 11-page document that addressed only the scope and processes of arbitration and mediation and clearly described and referenced arbitration rules. Nothing was inaccurate, hidden or buried.

Because the arbitration agreement is adhesive but does not cause surprise or oppression, Papudesi must show substantial substantive unconscionability exists

for it to be unenforceable. (*Ajamian v. CantorCO2e, L.P.*, *supra,* 203 Cal.App.4th at p. 796.)

2. Substantive Unconscionability

Papudesi argues Northrop's arbitration policy is unconscionable because it limits discovery and remedies. We disagree.

To ensure that an arbitration agreement in the employer-employee context does not curtail an employee's public rights, it must provide for more than minimal discovery and all types of relief as would be available in court. (*Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 712-713.) "Parties are entitled to discovery sufficient to vindicate their claims." (*Dotson v. Amgen, Inc*. (2010) 181 Cal.App.4th 975, 983.) Limiting discovery, however, is important to the streamlined nature of arbitration. (*Ibid.*) An arbitration policy need not make available the entire range of discovery that would be allowed in a civil lawsuit. (*Armendariz, supra*, 24 Cal.4th at pp. 105-106.)

Here, Northrop's arbitration policy requires any party seeking more than three depositions to participate in a joint meeting with the arbitrator to discuss discovery issues, limitations and scheduling. It also gives the arbitrator "authority to decide any disputes regarding discovery." JAMS and AAA discovery rules, which come into play in situations not covered by the policy's discovery rules, limit discovery but give the arbitrator authority to order any discovery necessary for a full exploration of issues in dispute. This is permissible. (*Armendariz, supra*, 24 Cal.4th 83 at p. 106 [parties are entitled to any discovery necessary to vindicate their rights]; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1475-1476 [AAA rules regarding discovery were adequate because they gave the arbitrator discretion to expand allowable discovery if necessary to vindicate rights]; *Dotson v. Amgen, Inc*., *supra*, 181 Cal.App.4th at p. 984 [a rule that limited initial discovery but allowed for expansion at the arbitrator's discretion allowed for adequate discovery].) Together, Northrop's and the JAMS and AAA rules entitle employees to adequate discovery.

Papudesi depends on *Fitz v. NCR Corp*., *supra*, 118 Cal.App.4th 702 for the proposition that limits on discovery in an employer-employee arbitration are not permissible. There, the arbitration policy at issue limited discovery to two depositions and expert testimony and provided that a "compelling need" must exist before an arbitrator could allow expanded discovery. The court held the discovery rules impermissibly favored the employer, which possessed a majority of the evidence. (*Id*. at pp. 716-717.) The case is distinguishable because here, unlike in *Fitz v. NCR*, Northrop's arbitration policy places no limit on the arbitrator's discretion to expand discovery.

Papudesi argues because the arbitration policy allows a prevailing *party* to recover attorney fees in arbitration, whereas the Labor Code allows only prevailing *employees* to recover attorney fees in court, it does not allow for the same remedies as would be available in court. The argument is without merit.

A degree of substantive unconscionability exists where an arbitration agreement fails to provide for all types of relief as would be available in court. (*Fitz v. NCR Corp*., *supra*, 118 Cal.App.4th at p. 712.) Here, the arbitration policy provided: "[i]f . . . any party prevails on a claim, which (if brought in a court) affords the prevailing party attorneys' fees and/or costs, then the arbitrator may award reasonable fees and/or costs to the prevailing party to the same extent as would apply in court." This provision grants the same relief as would be available in a civil lawsuit.

Because Papudesi adduces only limited procedural unconscionability and no substantive unconscionability, we conclude Northrop's arbitration policy is not unconscionable.

C. Class Waiver

Papudesi argues the arbitration policy is invalid under *Gentry* because it contains a class waiver. *Gentry* sets forth several factors to be considered on a case-by-case basis to determine whether a class action waiver renders an arbitration agreement invalid. Because the trial court found that no valid

arbitration agreement existed it declined to consider the *Gentry* factors and curtailed plaintiff's discovery on *Gentry* issues. The record is therefore insufficient for us to determine whether *Gentry* would invalidate Northrop's arbitration policy. Northrop preliminarily argues no *Gentry* analysis need be performed at all because the United States Supreme Court's recent decision in *Concepcion* overruled *Gentry*. For reasons we set forth in another case, *Franco v. Arakelian Enterprises, Inc*. (case No. B232583), we disagree.

Gentry held that in certain circumstances a class waiver that interfered with an employee's unwaivable statutory rights would be unenforceable. (42 Cal.4th. at p. 457.) The supreme court set forth five factors to consider when determining whether a class waiver interfered with unwaivable statutory rights: the modesty of individual claims; the employee's fear of retaliation; absent class members' awareness of their legal rights; the necessity of class action to assure enforcement of statutory rights; and other "real world obstacles to the vindication" of rights. (*Id*. at pp. 462-463.) If the trial court concludes, based on these factors, "that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.' [Citation.] The kind of inquiry a trial court must make is similar to the one it already makes to determine whether class actions are appropriate. '[T]rial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action. . . .' [Citation.]" (*Id*. at pp. 463-464, fn. omitted.)

A question exists as to whether *Gentry* remains good law after the U.S. Supreme Court's ruling in *Concepcion*, where the court held that a categorical state rule invalidating class arbitration waivers is preempted by the Federal

Arbitration Act. For reasons set forth in *Franco v. Arakelian Enterprises*, *supra* (B235730), we conclude *Gentry* survives *Concepcion* because it sets forth not a categorical rule but a multifactor test that rests in part on whether a class action "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." (*Gentry*, *supra*, 42 Cal.4th at p 463.)

Because a *Gentry* analysis is fact intensive, and because *Gentry* discovery was curtailed in this case, we will remand the matter for further proceedings, during which the trial court may conduct whatever additional factual and legal inquiries are necessary to decide the *Gentry* issue. (See *Wagner Construction Co. v. Pacific Mechanical Corp*. (2007) 41 Cal.4th 19, 31.)

D. NLRA

Papudesi cites *D. R. Horton, Inc*. (2012) 35*7 NLRB 184* (*Horton*), an administrative decision of the National Labor Relations Board (the Board), for the proposition that requiring an employee to waive class treatment of grievances violates the employee's right under the National Labor Relations Act to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.)

We decline to follow *Horton*. In *Concepcion*, the United States Supreme Court stated that under the FAA, an arbitration agreement must be enforced according to its terms, class waiver included. This is true unless the FAA's mandate has been "'overridden by a contrary congressional command.'" (*Compucredit Corp. v. Greenwood* (2012) ___ U.S. ___ [132 S.Ct. 665, 669, 181 L.Ed.2d 586].) The National Labor Relations Act's provision that an employee may engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" does not constitute a congressional command that the employee may disregard an agreement prohibiting class treatment of employment claims.

CONCLUSION

We conclude Northrop's arbitration policy constituted an agreement that was separate from and independent of Papudesi's employment contract. The agreement is not unconscionable, but its class waiver provision may yet be unenforceable under *Gentry*. Because the trial court did not reach this issue, we remand the matter for further proceedings.

DISPOSITION

The trial court's order denying Northrop's motion to compel arbitration is reversed. The matter is remanded for a determination whether *Gentry* invalidates the arbitration policy's class waiver. Each side is to bear its costs on appeal.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.